



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

BJG

Docket No: 6157-98

21 October 1999

MSGT [REDACTED] CR

Dear Master Sergeant [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 20 October 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) in your case, dated 18 August 1998, and the advisory opinion from the HQMC Military Law Branch, Judge Advocate Division (JAM4), dated 5 August 1999, copies of which are attached. They also considered your rebuttal letter dated 1 September 1998 with enclosures.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the report of the PERB and the advisory opinion from JAM4.

Contrary to the PERB report, the Board recognized that your contested adverse fitness report could be removed without removing your nonjudicial punishment (NJP). However, they otherwise concurred with the PERB report in finding that the fitness report should stand. They found no inconsistency between the comments and the mark of "unsatisfactory" in "judgment." They were unable to find that the report was based on conjecture; that it was a disciplinary tool; that your missions, tasks, and standards were not clearly communicated to you by your reporting senior (RS); that your RS had unreasonable expectations of you; that your low mark in "judgment" was the result of personal bias; or that your RS did not give you any room for making mistakes.

Concerning your contested NJP, the Board particularly noted that both you and the district commanding officer (CO) (your reviewing officer and the officer who awarded your NJP) conceded that you had made a mistake. They also noted that the investigating officer recommended that you be "formally disciplined as a result of drinking and driving." They were unable to find that the forfeiture imposed resulted from your testimony contradicting and thereby embarrassing your RS; nor could they find that you were not informed that the original findings in your case were not those your RS ultimately submitted.

Regarding both the fitness report and NJP at issue, the Board was unable to find that your RS's judgment was impaired to the point that he could not render a valid fitness report, exercise his own free will in preparing fitness reports, or effectively defend his position as to whether you warranted disciplinary action or an adverse fitness report. They noted that he indicates he did try to convince the district CO to change his position concerning your case; and that while he states the district CO said his judgment was obviously defective, he does not allege the district CO put undue pressure on him to change his own position.

In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER  
Executive Director

Enclosures



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
2 NAVY ANNEX  
WASHINGTON, D.C. 20380-1775

6157-98

IN REPLY REFER TO:  
1610  
MMER/PERB  
18 Aug 98

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)  
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF  
MASTER SERGEANT [REDACTED] USMC

Ref: (a) MSgt. [REDACTED] DD Form 149 of 13 Jul 98  
(b) MCO P1610.7D

1. Per MCO 1610.11B, the Performance Evaluation Review Board, with three members present, met on 13 August 1998 to consider Master Sergeant [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 951101 to 960229 (CH) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner contends the report is not based on established performance evaluation policy, that it is inaccurate and unjust, and the purpose/intent of the performance evaluation system was not followed in preparing and filing the challenged report. To support his appeal, the petitioner provides documentation which he believes establishes that the Reporting Senior had impaired judgment at the time of the report. More specifically, the petitioner believes the nonjudicial punishment (NJP) recorded in the fitness report was unjust and that the report itself was utilized as a disciplinary tool.

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. Contrary to what the petitioner believes, the report does not, as he contends, center on "only one incident." Other than the mark of "unsatisfactory" in item 14g (judgment), the petitioner was marked as "outstanding" in every other performance and quality trait (Items 13 and 14). His opinion that his rating in item 14g does not conform to the guidelines contained in reference (b) is simply not grounded in fact. We note that the Reporting Senior is explicit in his justification for the "unsatisfactory" mark in that category -- quite understandable given the circumstances surrounding the NJP.

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)  
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF  
MASTER SERGEANT [REDACTED], USMC

b. The Board is extremely bothered by the attacks on Major [REDACTED] judgment and mental state by Captain [REDACTED] and [REDACTED]. Neither of those individuals is a certified medical doctor and cannot, with any degree of credibility, comment on anyone's physical or mental condition. In this regard, the Board rejects their comments as unsubstantiated/undocumented hearsay.

c. The bottom line throughout the fitness report is that the petitioner was the recipient of NJP during the reporting period and that fact was correctly recorded via the performance evaluation system. Unless and until the NJP is set aside or otherwise eliminated from the record, removal of the fitness report is not warranted.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of Master Sergeant [REDACTED] official military record.

5. The case is forwarded for final action.

[REDACTED]  
Chairperson, Performance  
Evaluation Review Board  
Personnel Management Division  
Manpower and Reserve Affairs  
Department  
By direction of the Commandant  
of the Marine Corps



615798

**DEPARTMENT OF THE NAVY**  
**HEADQUARTERS UNITED STATES MARINE CORPS**  
**2 NAVY ANNEX**  
**WASHINGTON, DC 20380-1775**

IN REPLY REFER TO:

1070  
JAM4  
05 AUG 1999

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION  
IN THE CASE OF MASTER SERGEANT [REDACTED]  
[REDACTED] U.S. MARINE CORPS

Ref: (a) Col [REDACTED] ltr of 4 Sep 98  
(b) Manual for Courts-Martial, United States  
(1995 ed.), Part V

1. We are asked to provide an opinion regarding Petitioner's request that his nonjudicial punishment (NJP) during the reporting period from 1 November 1995 to 29 February 1996, be set aside. On 16 December 1998, we requested that BCNR seek the subject NJP records from Petitioner's command and forward them to us for our review. On 13 July 1999, we were notified by BCNR that Petitioner's NJP records are no longer available.

2. We recommend that relief be denied. Our analysis follows.

3. Background

a. Based on the limited information provided, it appears that Petitioner received NJP for misconduct related to his driving a Government vehicle within 8 hours of consuming alcohol.

b. A preliminary inquiry substantiated the misconduct. According to the NJP authority's statement in reference (a), Petitioner "admitted his mistake" at the NJP hearing. Furthermore, there is no evidence that Petitioner appealed the NJP authority's findings or sentence before this petition.

4. Analysis. Under reference (b), the NJP authority may impose punishment when he believes the preponderance of the evidence establishes the accused committed the offense charged. Absent clear evidence of an abuse of discretion, the NJP authority's findings should remain undisturbed. Petitioner has failed to demonstrate that the NJP authority abused his discretion in any way.

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION  
IN THE CASE OF MASTER SERGEANT [REDACTED]  
[REDACTED] MARINE CORPS

5. Conclusion. Accordingly, based on the information available,  
we recommend that the requested relief be denied.

[REDACTED]  
M  
Head, Military Law Branch  
Judge Advocate Division